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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA15-730

Filed: 16 February 2016

Forsyth County, Nos. 13CRS060362, 14CRS000144

STATE OF NORTH CAROLINA

v.

COREY DEMOND PHILLIPS, Defendant.

Appeal by Defendant from judgment entered 28 August 2014 by Judge David L. Hall in Forsyth County Superior Court. Heard in the Court of Appeals 16 November 2015.

*Attorney General Roy A. Cooper, III, by Assistant Attorney General Barry H. Bloch, for the State.*

*Jarvis John Edgerton, IV, for the Defendant.*

DILLON, Judge.

Corey Demond Phillips appeals from judgment entered upon jury verdicts finding him guilty of robbery with a dangerous weapon and attaining the status of an habitual felon. We find no error.

I. Background

The evidence at trial tended to show the following: On 19 October 2013, a man wearing a black hat, green jacket, black pants, and black and white tennis shoes

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entered a convenience store in Winston-Salem. He asked the clerk for a hot dog. As she prepared it, other customers who had been in the store left. The man then asked the clerk whether her manager was working. When she said no, the man announced, “This is a robbery,” and demanded money and Newport cigarettes while wielding what appeared to the clerk to be a knife.

The clerk handed over the money and the cigarettes and the man fled, taking beer with him as he left.

Responding officers formed a perimeter around the area and K-9 units began tracking the man. Defendant was discovered lying underneath a row of bushes nearby. Money and Newport cigarettes were found on the ground near Defendant. Beer containers were discovered in a dumpster. The clerk identified Defendant as the robber. The clothes Defendant was wearing also matched the description of the robber. However, the knife was never recovered.

Defendant was indicted for robbery with a dangerous weapon and attaining the status of an habitual felon. The matter came on for trial in Forsyth County Superior Court. Judge David L. Hall presided over a two-day trial. The jury found Defendant guilty of robbery with a dangerous weapon and attaining the status of an habitual felon. Judge Hall sentenced Defendant to prison for 140 to 180 months. Defendant entered notice of appeal in open court.

II. Analysis

Defendant makes two arguments on appeal, which we address in turn.

A. Motion to Dismiss

Defendant first argues that the trial court erred in denying his motion to dismiss the charge of robbery with a deadly weapon at the close of the evidence based on an alleged insufficiency of the evidence. Specifically, Defendant contends there was insufficient evidence that a *dangerous weapon* was used in the commission of the robbery. We disagree.

A motion to dismiss based on an alleged insufficiency of the evidence must be denied where there is substantial evidence of (1) the elements of the crime and (2) that the defendant was the perpetrator of the crime. *State v. Call*, 349 N.C. 382, 417, 508 S.E.2d 496, 518 (1998). The trial court considers the evidence in the light most favorable to the State. *State v. Powell*, 299 N.C. 95, 99, 261 S.E.2d 114, 117 (1980). “Substantial evidence” has been defined as “that amount of relevant evidence necessary to persuade a rational juror to accept a conclusion.” *State v. Mann*, 355 N.C. 294, 301, 560 S.E.2d 776, 781 (2002). “This Court reviews the trial court’s denial of a motion to dismiss *de novo*.” *State v. Smith*, 186 N.C. App. 57, 62, 650 S.E.2d 29, 33 (2007) (emphasis in original).

Our Supreme Court has held that one of the elements of robbery with a dangerous weapon is the “use or threatened use of a firearm or other dangerous weapon[.]” *State v. Small*, 328 N.C. 175, 181, 400 S.E.2d 413, 416 (1991). Further,

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while “[a] knife is not always a dangerous weapon *per se*,” *see State v. Bellamy*, 159 N.C. App. 143, 148, 582 S.E.2d 663, 667 (2003) (emphasis in original), whether it is “depends upon the nature of the instrument, the manner in which the defendant used it or threatened to use it, and in some cases the victim’s perception of the instrument and its use,” *see State v. Peacock*, 313 N.C. 554, 563, 330 S.E.2d 190, 196 (1985).

In *State v. Allen*, 317 N.C. 119, 343 S.E.2d 893 (1986), our Supreme Court articulated three rules that govern whether evidence is sufficient to establish that an instrument used in a robbery qualifies as a dangerous weapon. *Id.* at 124-25, 343 S.E.2d at 897. The first rule is that, generally speaking, use during a robbery of what “appear[s] to *the victim* to be a . . . dangerous weapon . . . [creates] a mandatory presumption that the weapon was as it appeared to the victim to be.” *Id.* at 124, 343 S.E.2d at 897 (emphasis added). The second rule modifies the first where “there is *some* evidence that the implement used was not a . . . dangerous weapon,” and the mandatory presumption transforms into a permissive inference, creating a jury question regarding the weapon’s dangerousness. *Id.* (emphasis added). The third rule creates the opposite mandatory presumption that the weapon is *not* a dangerous weapon, where “*all* the evidence shows the instrument could not have been a . . . dangerous weapon[.]” *Id.* at 124-25, 343 S.E.2d at 897 (emphasis added).

In the present case, the evidence clearly conflicted as to whether Defendant used a dangerous weapon in the commission of the robbery, creating a jury question

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regarding its dangerousness. Although Defendant maintained throughout the proceedings below – indeed, it was essentially the theory of his entire defense – that though he committed the robbery, he did not do so with a weapon, the store clerk nevertheless testified to the contrary. Specifically, she stated that she saw a knife when Defendant robbed her, describing this knife as “a thing that they ma[k]e in jail – a shank”; that Defendant showed this shank to her; that this shank was in Defendant’s jacket; that this shank had a blade; and that she saw its blade. In spite of the State’s failure to produce the knife at trial, viewing the other evidence in the light most favorable to the State, as we are required to do, we hold that the store clerk’s testimony constituted substantial evidence that a dangerous weapon was used in the commission of the robbery. Therefore, there was a permissive inference that the weapon in question was what it appeared to the victim, the store clerk, to be – a dangerous weapon – and the trial court did not err in denying Defendant’s motion to dismiss based on this alleged deficiency. Accordingly, this argument is overruled.

B. Jury Instructions

Defendant next argues that the trial court erred in denying his request for a special jury instruction regarding the charge of robbery with a dangerous weapon. Specifically, Defendant contends that the court erred in denying his request for an instruction clarifying that the jury was permitted but not required to find that the weapon used in the commission of the robbery was a dangerous weapon. We disagree.

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Generally, while a court must give a special instruction where it is requested and supported by the evidence, the court need only do so where the evidence supports it. *State v. Blair*, 181 N.C. App. 236, 242, 638 S.E.2d 914, 919 (2007). Furthermore, the court need not use the exact language requested. *State v. Augustine*, 359 N.C. 709, 729, 616 S.E.2d 515, 530 (2005). Rather, all that is required is that the court give the requested instruction in substance. *Id.* Thus, where the evidence supports the pattern instruction, and the pattern instruction substantially conforms to the requested instruction, it is not error for the court to simply give the pattern instruction. *State v. Lloyd*, 354 N.C. 76, 92, 552 S.E.2d 596, 610 (2001).

In the present case, the trial court instructed the jury in accordance with the pattern instructions in relevant part as follows:

[T]he defendant has been charged with robbery with a dangerous weapon, which is taking and carrying away the personal property of another from her person or in her presence without her consent by endangering or threatening a person's life with a dangerous weapon, the taker knowing that he was not entitled to take the property and intending to deprive another of its use permanently.

...

For you to find the defendant guilty of this offense, the State must prove seven things beyond a reasonable doubt:

First, that the defendant took property from the person of another or in her presence.

Second, that the defendant carried away the property.

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Third, that the person did not voluntarily consent to the taking and carrying away of the property.

Fourth, that the defendant knew he was not entitled to take the property.

Fifth, that at the time of the taking, the defendant intended to deprive that person of its use permanently.

Sixth, that the defendant had a dangerous weapon in his possession at the time he obtained the property or that it reasonably appeared to the victim that a dangerous weapon was being used, in which case you may infer that said instrument was what the defendant's conduct represented it to be.

In determining whether a weapon is a dangerous weapon, you should consider the nature of the weapon, the way in which the weapon was used, and the size and strength of the defendant as compared to the victim. A dangerous weapon is a weapon which is likely to cause death or serious bodily injury.

And, seventh, that the defendant obtained the property by endangering or threatening the life of that person with the dangerous weapon.

If you find from the evidence beyond a reasonable doubt that on or about the alleged date, the defendant had in his possession a dangerous weapon and took and carried away property from the person or in the presence of another person without her voluntary consent by endangering or threatening her life with the use or threatened use of a dangerous weapon, the defendant knowing he was not entitled to take the property and intending to deprive that person of its use permanently, it would be your duty to return a verdict of guilty of robbery with a dangerous weapon.

If you do not so find or have a reasonable doubt as to one

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or more of these things, you will not find the defendant guilty of robbery with a dangerous weapon.

*See* N.C.P.I.—Crim 217.30 (2003).

During the charge conference, Defendant’s counsel requested and the trial court considered a clarifying instruction reiterating that the question of whether the weapon allegedly used in the commission of the robbery qualified as a dangerous weapon was a question of fact for the jury to resolve. However, the court denied the request. Specifically, the following colloquy transpired:

THE COURT: . . . As I understand it, . . . [defense counsel] is simply requesting an additional sentence – “You, the jury, shall determine whether the weapon was a dangerous weapon.”

Is that – am I understanding you correctly?

[DEFENSE COUNSEL]: Yes, sir. That’s correct.

[PROSECUTOR]: Your Honor, that’s exactly what Element 6 is. I think an additional sentence would be overemphasizing Element 6.

THE COURT: Let me take a look at a couple of cases here. Won’t take me but a second.

. . .

THE COURT: All right. Having reviewed applicable case law, the Court determines that no additional language is necessary or appropriate under these circumstances.

Thus, Defendant was not requesting a deviation from the pattern instruction based on the existence of evidence supporting a different instruction. Rather, he was



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seeking a special, clarifying instruction where the evidence supported the pattern instruction. We hold that the pattern instruction substantially conformed to the requested instruction and, therefore, it was not error to instruct the jury according to the pattern instruction. *See Lloyd*, 354 N.C. at 92, 552 S.E.2d at 610. Accordingly, this argument is overruled.

III. Conclusion

Defendant received a fair trial, free from error.

NO ERROR.

Chief Judge McGEE and Judge DAVIS concur.

Report per Rule 30(e).